No. 3961 No. 3978.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF

PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation,

Bankrupt,

COMMONWEALTH OF AUSTRALIA,

Petitioner,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as trustee in bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt,

Respondents,

COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia,

Appellants,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt,

Appellees.

REPLY BRIEF OF PETITIONER AND APPELLANTS

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The petitioner and appellants, in accordance with the permission of this court granted in the argument, files this, a brief in reply to the brief of respondents and appellees.

Respondents' Motions To Dismiss.

Respondents move to dismiss the appeal upon two grounds: First: That petition for revision is the proper remedy. We agree with the respondents upon this point but merely state that both revision and appeal were perfected out of an excess of caution. This practice has received the express approval of this court in *Chavelle v. Washington Trust Company,* 226 Fed. 400, 405, and *In re Creech Bros. Lumber Co.,* 240 Fed. 8, 12, first paragraph.

Second: Because no brief has been filed in the appeal case. Upon the record as it originally stood, the appeal case would not have been placed upon the docket until the May term, so that appellant would have had at least until the 1st of March in which to file a brief in this case. In the stipulation for consolidation, however, it was stipulated that the appeal case might be heard along with the revision case, but the consideration for such stipulation was that "the above mentioned case on appeal may be heard and determined upon the briefs filed in the revision case and upon the argument of the revision case." Counsel for the respondent, however, at the time of the argument stated that while he did not agree with our interpretation of this stipulation, he waived this point of his motion.

Respondents next move to dismiss the petition for revision upon two grounds:

First: That the petitioner has no standing in this court. The petitioner has duly filed its claim and pressed the same to an adjudication. The mere fact that the lower court has decided this case against the petitioner does not prevent it from taking all necessary steps to preserve its rights.

If the decision of the district court disallowing the claim of the petitioner should be reversed upon appeal, this petitioner is an interested party to the extent of over 90 per cent. of the total amount of this claim. The referee recognized our right to object to this allowance before him and this recognition was made without any protest on the part of anybody at the creditor's meeting. The referee recognized our right to a petition for review by sending it up together with his certificate to the district court, and the district court has recognized our rights in the matter by hearing the case upon the merits: all this without any objection on the part of either of the respondents. It is clear that we have a very substantial interest in the result of this proceeding and clearly come within the purview of the statute giving to "any party aggrieved" the right to petition this court to exercise its revisory power under Sec. 24 (b) of the Bankruptcy Act.

Second: The respondents urge the dismissal of the petition for revision on the second ground that

a creditor can not file a petition for revision without first making a demand upon the trustee to review the order. In support of this position they cite two cases, both of which are to the effect that one creditor can not appeal from an order allowing the claim of another creditor but such appeal must be taken in the name of the trustee. This, we respectfully submit, is not the present state of the law. Respondents cite but one case from an appellate court, that of *Chatfield v. O'Dwyer,* 101 Fed. 797, a decision by the circuit court of appeals for the 8th circuit. This same court however, in the case of *Rosenbaum v. Dutton,* 203 Fed. 838, 841, used the following language:

> "We are of the opinion that by 'parties in interest' in this section of the Bankruptcy Act are included all persons who have an interest in the *res* which is to be administered. *In Re Sully,* 152 Fed. 619, 81 C. C. A. 609, it was held:
>
> 'The term "parties in interest" applies to those who have an interest in the *res* which is to be administered and distributed in the proceeding, and does not include those who are merely debtors or alleged debtors of the bankrupt.'
>
> In the instant case the only parties who have any interest in the res of this bankrupt are the appellants, for they are the only persons who can be injuriously affected by the result of the determination of this claim of appellee. It is true that it has been determined by this court in *Chatfield v. O'Dwyer,* 101 Fed. 797, 42 C. C.

A. 30, that an appeal from an order of the District Court allowing a claim presented by a creditor against the estate of the bankrupt, and which was objected to and contested by another creditor, can only be taken by the trustee in bankruptcy as the representative of all the creditors, but it was further held in that case, if the trustee in such a case refuses to appeal from the allowance of the claim on the request of the objecting creditor, the latter may move the District Court to direct the trustee to take an appeal as requested, or to permit the creditor to prosecute an appeal in the name of the trustee. In that case the trustee was not a party to the petition for review, nor was there any effort made to have him become a party to or permit the appellants to take an appeal in his name, while in the case at bar the trustee had joined appellants in the petition for review, and when it came up for hearing withdrew."

The last quoted opinion of the circuit court of appeals for the 8th circuit is merely in line with the decisions of the other federal appellate courts,—*In re Sully,* 152 Fed. 619, 620, where the circuit court of appeals for the 2nd circuit held that creditors had a right to re-examine claims that had been approved by the trustee; *Ohio Valley Bank v. Mack,* 163 Fed. 155, 156, where the circuit court of appeals for the 6th circuit entertained an appeal prosecuted by a creditor, and *In re National Pressed Brick Co.* 212 Fed. 878, 883, where the circuit court of appeals of the 6th circuit used the following language:

> "Motion is made to dismiss the appeal from the allowance of the other claims because not taken by the trustee, and for lack of evidence that that officer had refused a request to appeal. A creditor may, under proper circumstances, be permitted to take an appeal when the trustee has refused to do so."

But even if that should be the law as to appealing from an order approving a claim of a creditor, such a rule did not apply in this case, for the following reasons:

The allowance of a creditor's claim is a judicial matter. The issues are made up and tried as a judicial matter by the creditor on the one side and the trustee upon the other. The trustee is ordinarily the only party who appears in opposition for the reason that he represents all of the creditors and there is no provision made in the statute for a creditor's even so much as having notice of the proceedings which are to result in the allowance or disallowance of the claim. In the present proceeding, however, the matter is different. The matter came up in a creditor's meeting, on the petition of the trustee to be permitted to make this payment. This petition shows that he employed Mr. MacDonald and rendered himself liable for compensation to be paid to Mr. MacDonald and asked the approval of the creditors to such action. It was a proceeding of which, under the bankruptcy act, every creditor was entitled to have notice, and at which any creditor was en-

titled to make objection at such creditors' meeting. Of what use is the provision in the bankruptcy act requiring the creditor to be given notice of the proceeding if the creditor is not entitled to make any objection? And what use is it to make objection before the referee if he would not be entitled to carry such objection to the district court and to this court? The theory of the cases cited by the respondents is that the trustee represents all the creditors. In this case, however, the trustee is a partisan and a violent partisan at that, of Mr. MacDonald. The firm of attorneys who have acted throughout as attorneys for the trustee appeared in the district court in support of the order giving Mr. MacDonald this compensation. The trustee was united with Mr. MacDonald as a party respondent in the appellate proceeding, is appearing in this court by the same attorneys, and through his attorneys has united with Mr. MacDonald in filing his brief asking that this compensation be paid. Under such extraordinary circumstances it would most certainly be an extraordinary situation to expect a trustee to sue himself by appearing as a petitioner in this court asking to have an order set aside which he has stoutly striven for, both before the referee and the district judge. If the trustee were the petitioner in this case, there can be not the slightest doubt that even if he should make a bona fide attempt to reverse the order of the district court, under the state of this record he

would be held to have effectually estopped himself from such a procedure in view of the extraordinary situation in this case of a trustee becoming a partisan supporter of what a creditor considers an improper claim. To deny that such creditor is not "any party aggrieved" under §24(b) would be clearly in violation of both the spirit and the letter of the bankruptcy act.

As we have heretofore said, opposing another point of respondents, both the referee and the district judge have, in view of the extraordinary circumstances of this case, recognized our right to be heard upon the merits of this question, without objection on the part of the trustee. The trustee is a party in this proceeding and has full opportunity to be heard and is being heard even if it is in direct opposition to the interests of the creditors, and unless a creditor can be heard, the payment of the sum of $13,500. must be permitted to be made by default.

On the Merits.

We fully agree with the respondents in their legal position that in passing upon the petition for revision under §24(b) of the Bankruptcy Act, this court will consider only disputed questions of law.

The respondents have filed an answer in this case which does not contain a denial of a single ma-

terial fact as set forth in the petition for revision. The questions submitted by the petition for revision are purely questions of law founded either upon undisputed facts, or a total absence of any evidence in the record sufficient to justify the action of the District Court.

Taking up the specifications in the order which the respondents used, we will first take up the question of

Excessive Allowance.

In this case both the referee's certificate (Rec. p. 18 and the order for disbursement (Rec. p. 24) show clearly that the referee made an allowance which he considered proper for both Mr. MacDonald's expenses and his services in connection with the claim agaist the shipping board, and his services in connection with contesting the claim of the Australian Government.

This allowance is, therefore, excessive in that it is clearly made for three causes, and even if we should assume that one of those claims, his services at Washington, is good, it clearly appears that the allowance was made on account of expenses and services in pointing out the objections to petitioner's claim. The referee in his certificate frankly admits that an allowance for expenses as such would be er-

roneous (Record p. 18) and we have shown in our opening brief good and sufficient reason why any allowances for compensation in assisting the resistance of the claim of the Australian Government are out of the question. The referee, however, has included these two items in a blanket allowance, and such allowance is clearly erroneous and excessive as a matter of law and therefore should not be allowed to stand.

No Employment of MacDonald.

The respondent under this head claims that no objection was made before the referee on the ground that the trustee was not authorized to employ MacDonald, that the objection was merely that MacDonald was never employed. There are two essentials to a contract which purports to have been made by an agent; one is the actual making of the contract and the other is the authority of the agent to make such a contract. If the agent was not authorized to make such a contract, there was clearly no contract. Therefore, the objection that no contract was ever made includes the objection that if the trustee attempted to make any such contract, he was not authorized to make such a contract. Where the contract purports to have been made by an agent, it is just as much an absolute essential to prove the au-

thority of the agent as it is to prove the actual making of the contract, and denial in pleadings that a contract was ever made is clearly a denial sufficient to authorize the denial of the authority of the agent to make such contract. This objection of the respondents is merely a play upon words.

But even if the petitioner had not mentioned this objection specifically at the creditors' meeting, it was raised specifically and definitely in its petition for review. (Record p. 22, Specification of Error 3.) Counsel for the respondents both upon this point and in various other places in their brief appear to be of the opinion that every point of law advanced in a petition for review has been waived if the same identical point of law had not already been advanced before the referee at the time of the hearing before the referee, but such is not the law, as can be gathered from the following quotations:

> "If a point is presented by the record, a district court may consider it although it was not discussed before or by the referee. The court is not barred by or confined to the matters certified by the referee; under its broad general powers it may consider any points presented by the record."
>
> *Collier on Bankruptcy,* 12th Ed. 1921, Volume 1, p. 673.

> "It is said, for instance, that the court may properly consider any point presented by the record before it whether or not such point was

discussed before or by the referee, and it has even been held that it is perfectly permissible for the judge to take any testimony if it is offered before him."

Black on Bankruptcy, 3rd Ed., p. 179.

"Upon the point of practice raised preliminarily to the main argument, we are clearly of the opinion that, when a District Court is reviewing an order or report of a referee in bankruptcy, under the very broad provisions of Act July 1, 1898, c. 541, §2 (10), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), it may properly consider any point presented by the record then before it, whether such point was or was not discussed before or by the referee."

In re Samuel Wilde's Sons, 144 Fed. p. 972 (C. C. A., 2nd Cir.).

Is the Petitioner Estopped?

Respondents then claim that because the court had already made Mr. MacDonald allowances on account of services and expenses, thereby the petitioner is estopped from questioning this allowance. We would call attention to the fact that there is not a scintilla of evidence that the idea was ever advanced that Mr. MacDonald was to receive any compensation for services rendered in defeating the Australian Government's claim until his letter of July 20, 1922, claiming such compensation. The previous

orders were all made in connection with his expenses upon his trip to Washington and were made generally without any specification as to what services were being paid for, and according to Mr. MacDonald himself were credited by him on account solely of expenses (transcript of record on appeal, p. 18). The claim that the Australian Government ever consented to or acquiesced in the trustee employing a witness hostile to the Australian Government and agreeing to pay him a fancy price for his services would be the height of the ridiculous.

The Character of the Services Rendered.

The respondent under this heading appears to take it for granted that we are merely differing with the referee and the district judge upon the quality of the services rendered, but our objection goes farther. There is absolutely not the slightest scintilla of evidence in this case as to what those services were that would justify such a bountiful compensation. There are several adjectives used such as extraordinary, indispensable, and the like, but it is a very easy matter to use such adjectives. Mr. MacDonald presented his bill and on account of its indefiniteness he was ordered by the judge to file an affidavit regarding the nature of his claim. In addition to that, the statement of evidence shows that

the nature of his services was questioned at the creditors' meeting. In our opening brief, we asked for the nature of these services, and all that we have ever been able to elicit from anybody was that these services were "extraordinary," "indispensable" and "consisted of assembling documents" and the like. We fully appreciate the fact that frequently courts have held that the allowance of *attorney's fees* are purely within the discretion of the court to be determined, even without the taking of evidence, but that is based upon the fact that the services had been rendered before the court who is fixing the fee and who is himself a lawyer and amply qualified to pass upon the reasonableness of the fees. But here is a case where none of the services were rendered before the referee; they were not the kind of services as to qualify the referee to be able to fix their value; in fact, they were merely an appeal to the generosity of the referee unsupported by any evidence whatever.

No Sworn Statement.

Next, the respondents claim that because the letter of Mr. MacDonald claiming compensation was attached to the trustee's report which report contained the statement that he had received such letter and was made under oath, was a sufficient compliance with §62 of the Bankruptcy Act which re-

quires that "the actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath." This letter contained a list of expenses which the referee at the time of the hearing found to be absolutely unsupportable and this same list was repeated in Mr. MacDonald's affidavit.

A stipulation made between the parties contains the point blank statement that there was no sworn statement, either oral or written, made regarding the nature of the services rendered by the said A. M. MacDonald for the said bankruptcy estate. (Record on Appeal p. 35). If this procedure is to obtain the approval of this court as a substantial compliance with §62 of the bankruptcy act above quoted, most of the bankruptcy act might as well be repealed and the entire administration of the bankrupt's assets be turned over to the referee to be administered by him as shall seem best to him in the exercise of an arbitrary discretion without any chance of review or appeal offered to any of the interested parties.

We respectfully submit that the purely technical points of law raised in the respondents' brief are without merit and that the order of the District Court should be reversed.

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